IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

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| STATE OF DELAWARE, | : | Def. ID# 9807015270 |
| Plaintiff below/appellant, | : | |
| v. | : | |
| TIMOTHY C. KELLY, | : | |
| Defendant below/appellee. | : | |

DECISION ON APPEAL

DATE SUBMITTED: March 12, 2007

DATE DECIDED: June 20, 2007

Paul R. Wallace, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801 and Carole E.L. Davis, Esquire, Department of Justice, 114 E. Market Street, Georgetown, DE 19947, attorneys for appellant

Michael Abram, Esquire, P.O. Box 824, Georgetown, DE 19947, attorney for appellee

Graves, J.

Pending before the Court is an appeal which the State of Delaware ("the State") has brought, pursuant to 10 Del. C. § 9902(a),[1] from a decision of the Court of Common Pleas ("CCP") dismissing an information filed against defendant Timothy C. Kelly ("defendant") on the ground that the applicable statute of limitations barred prosecution of the case.

This is my decision wherein I grudgingly affirm the decision below, not because I disagree with the Court below, but because the outcome rewards a fugitive from justice.

FACTS

On July 22, 1998, defendant was arrested in the city of Rehoboth Beach, Delaware on charges of driving under the influence of alcohol with a blood alcohol content of .23% pursuant to 21 Del. C. § 4177(a) and disregarding a traffic control device in violation of 21 Del. C. § 4107(a). A different officer arrested defendant on each charge. The respective arresting officers signed and swore to the respective complaints for each charge.[2] Defendant was summoned to appear at Justice of the Peace ("JP") Court 2 on July 25, 1998. This procedure was in accordance

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[1]In 10 Del. C. § 9902(a), it is provided in pertinent part as follows:

> (a) The State shall have an absolute right to appeal to an appellate court a final order of a lower court where the order constitutes a dismissal of an indictment or information ....

[2]The charging documents are the tickets issued. The information on these tickets is the exact same information as would have been included in an information filed with CCP. The only difference between the charging documents here and the information is who signed them. The arresting officers **who witnessed the crimes and who would be the testifying at the trial** signed the tickets while a member of the Attorney General's office signed the information after taking the information off the tickets and putting it into the information. As will become clear later, this fact adds to the insult of the final decision in this case, which implies that an information is somehow more significant than the tickets in this case.

with 21 Del. C. § 701(a)(1),[3] § 703,[4] and 11 Del. C. § 1907(a).[5]

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[3]In 21 Del.C. § 701, it is provided in pertinent part as follows:

(a) ...[O]ther police officers authorized by law to make arrests for violation of the motor vehicle and traffic laws of this State, provided such officers are in uniform or displaying a badge of office or an official police identification folder, may arrest a person without a warrant:

(1) For violations of this title committed in their presence....

[4]In 11 Del. C. § 703, it is provided in pertinent part as follows:

(a) A person arrested without a warrant for a violation of any section of this title, or arrested for any moving traffic violation or any municipal ordinance regulating traffic within its territorial limits as set forth in Chapter 41 of this title shall have such case heard and determined by a justice of the peace.

(b) Notwithstanding subsection (a) of this section, the arresting officer may issue a summons to the person arrested for an appearance at a subsequent date before a Justice of the Peace.

(c) The arresting officer shall take the person arrested without a warrant, or shall summon the person arrested to appear at a subsequent date, before a Justice of the Peace Court which is located in the same county wherein the violation occurred, unless a Justice of the Peace Court located in another county is closer to the place where the violation occurred, in which case the arresting officer may take the person arrested without a warrant, or may summon the person arrested to appear at a subsequent date, before said Court.

[5]In 11 Del. C. § 1907(a), it is provided as follows

(a) In any case in which it is lawful for a peace officer to arrest without a warrant a person for a misdemeanor, the officer may, but need not, give the person a written summons in substantially the following form:

Violator's Last Name First Middle O.C.P. No. Birth Date Sex M F

No. and Street City State W B O Color Occupation

The proceedings against defendant **commenced** upon the filing of the sworn tickets with the JP Court. JP Crim. R. 3.[6]

Defendant did not appear for his arraignment on July 25, 1998, as summoned. On August

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Owner's Name First Middle State Tag No.

Address

Specific Offense Sec. No. Date Acc.
Time M. Yes No

Hundred County Route No. Exact Location

S K NC
Magistrate Arresting Officer Date of Trial

Troop Time
Address

You are hereby directed to appear at the time and place designated above to stand trial for the offense indicated. A failure to obey this summons may result in fine or imprisonment, or both.

Final Disposition of Upper Court Remarks

TRAFFIC ARREST REPORT
DELAWARE STATE POLICE

[6]In JP Crim. R. 3, it is provided:

(a) *Commencement.* Proceedings may be by complaint of information, or, when lawful, by arrest or summons without a warrant or complaint.
(b) *Complaint.* The complaint is a written statement of the essential facts constituting the offense charged and shall further include the title, section, and subsection of the applicable statute, rule, regulation or other provision of law, which is allegedly violated. It shall be made upon oath or affirmation by the complainant before any person authorized by law to perform a notarial act. The complaint may be based upon personal knowledge or upon reasonable information and belief.

12, 1998, a Justice of the Peace issued a warrant for the arrest of defendant because he failed to appear for his arraignment in the pending case. 11 Del. C. § 1907(b).[7] Defendant's failure to appear for arraignment was illegal. 11 Del. C. § 1907(c).[8]

On May 26, 2006, defendant's attorney entered his appearance on behalf of defendant and requested transfer of the case to CCP pursuant to 11 Del. C. § 5303[9] and § 5305.[10] On June 15, 2006, the State filed an information in accordance with CCP Criminal Rule 3.[11] The information contained two counts. The first count charged defendant with driving under the influence of

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[7]In 11 Del. C. § 1907(b), it is provided: "If the person fails to appear in answer to the summons, or if there is reasonable cause to believe that the person will not appear, a warrant for the person's arrest may issue."

[8]In 11 Del. C. § 1907(c), it is provided: " Whoever wilfully fails to appear in answer to the summons may be fined not more than $100 or imprisoned for not more than 30 days, or both."

[9]In 11 Del. C. § 5303, it is provided in pertinent part:

> The accused in all criminal cases in which there is a possibility that a period of incarceration or the maximum fine is $15 or more may be imposed where a justice of the peace ..., in the county where the charge is brought has jurisdiction and power to hear and finally determine the matter, may elect at any time prior to day of trial to have the case tried by the Court [of Common Pleas].

[10]In 11 Del. C. § 5305, it is provided in pertinent part:

> (a) In all those cases where, by § 5303 of this title, the accused may elect to be tried by the Court [of Common Pleas], if the accused elects to be tried by the Court [of Common Pleas], the justice of the peace shall hold such accused under sufficient bail for a hearing or for accused's appearance at the Court [of Common Pleas] where the matter shall proceed as though originating in the Court [of Common Pleas] by information filed.

[11]In CCP Crim. R. 3, it is provided: "Proceedings may be instituted by the filing of an information or as otherwise provided by the Constitution of this State, by statute, or otherwise by these Rules."

alcohol in violation of 21 Del. C. § 4177 (a) (4) on the second block of Rehoboth Avenue, Rehoboth, Delaware, on or about July 22, 1998 and the second charged him with failing to obey a traffic control device in violation of 21 Del. C. § 4107(a) on or about the same time and place.

Defendant filed a motion to dismiss the information on the ground that the statute of limitations barred it. The statute of limitations appears in 11 Del. C. § 205. That statute provides in pertinent part as follows:

> (b) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:
> ***
> (2) A prosecution for a class A misdemeanor must be commenced within 3 years after it is committed;
> (3) A prosecution for a class B misdemeanor, a class C misdemeanor, an unclassified misdemeanor or a violation must be commenced within 2 years after it is committed.
> ***
> (f) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.
> (g) For purposes of this section, a prosecution is commenced when either an indictment is found or an information is filed.
> (h) The period of limitation does not run:
> (1) During any time when the accused is fleeing or hiding from justice so that the accused's identity or whereabouts within or outside the State cannot be ascertained, despite a diligent search for the accused; or
> (2) During any time when a prosecution, including a prosecution under a defective indictment or information, against the accused for the same conduct has been commenced and is pending in this State.
> ***
> (j) In any prosecution in which subsection ... (h) ... of this section is sought to be invoked to avoid the limitation period of subsection (b) of this section, the State must allege and prove the applicability of subsection ... (h) ... as an element of the offense.[12]

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[12]The State did not allege in the information that any portion of subsection (h) applied, see State v. Williams, 69 A.2d 299 (Del. Super. 1949); thus, the applicability of this provision is not in issue.

Defendant argued that the motor vehicle violations are classified as misdemeanors. The applicable statute of limitations is three years for a Class A misdemeanor and two years for all other misdemeanors. 11 Del. C. 205(b)(2) and (3).[13] Thus, the information, which was filed nearly eight years after the offense allegedly was committed, was untimely.

The State made several arguments in response. First, it argued there is no statute of limitations for motor vehicle violations. Alternatively, it argued that at the time of the arrest, no information or indictment could be filed in JP Court; instead, proceedings were commenced by complaints. The State argued that a complaint is encompassed within the term "indictment" or "information" as set forth in 11 Del. C. § 205(g), citing State v. Lynch, Del. Super., Cr. A. No. S88-05-0000A, Chandler, J. (October 18, 1988) ("Lynch").

In Lynch, the Superior Court examined whether the language of 10 Del. C. § 9902(a), which provides for appeals from dismissals of an indictment or information, included dismissals of complaints in JP Court. The Court stated in Lynch:

> (6) This Court's ultimate aim in construing § 9902 is of course to satisfy the legislative will and purpose as expressed generally in the statutory language. The conventional technique is for the Court to interpret the words used, in a manner consistent both with their ordinary usage and with the discernible overall intent of the statute. In so doing I must attempt to place myself in the position of the persons who drafted and enacted it, to determine how such persons would intend this question to be decided.

The Superior Court then examined the legislative history and concluded that the Legislature intended, by enactment of the statute, to expand, not limit, the State's appeal rights. The Court was convinced the Legislature did not focus on the exact issue before it, but if it had, it "would

[13]In 11 Del. C. § 205, it is provided in pertinent part:

have sustained the State's right to appeal under § 9902(a) from JP orders dismissing complaints." Furthermore, the Court reasoned, adopting the defendant's view would lead to an asymmetrical result where defendants could appeal JP judgments but the State could not, except in very limited circumstances. Thus, the Court concluded that § 9902(a) includes the term "complaint" within the terms "indictment and information". After reaching this conclusion, the Court reasoned:

> I should also note that in legal parlance the term "complaint" is understood in the same generic sense as the term "information" to mean simply a written statement of the charges preferred against a particular person before a magistrate having jurisdiction. *** For this reason as well -- the functional equivalency of the terms -- I am satisfied that the State's appeal under § 9902(a) is proper.

CCP issued a written decision and order granting defendant's motion. State v. Kelly, Del. CCP, Cr. No. 9807015270, Clark, J. (Aug. 23, 2006). I examine its decision below.

CCP concluded that the charges were unclassified misdemeanors pursuant to 11 Del. C. § 4202(b).[14] Thus, pursuant to 11 Del. C. § 205(b)(3), the applicable statute of limitations is two years. Accord State v. Smith, Del. Super., Def. ID# 93004273, Cooch, J. (Nov. 19, 1993). Rightfully, that conclusion is unchallenged on appeal.

CCP explained that on July 6, 2006, the Governor signed Senate Bill 334. That bill amended 11 Del. C. § 205(h) to add subsection 2, which precludes the statute of limitations from running:

> (2) During any time when the accused in a prosecution has become a fugitive from justice by failing to appear for any scheduled court proceeding related to such prosecution for which proper notice under the law was provided or

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[14]In 11 Del. C. § 4202(b), it is provided:

> (b) Any offense defined by statute which is not specifically designated a felony, a class A misdemeanor, a class B misdemeanor or a violation shall be an unclassified misdemeanor or an environmental misdemeanor.

attempted. It is no defense to a prosecution under this paragraph that the person did not receive notice of the scheduled court proceeding.

CCP summarized the synopsis to Senate Bill 334, which provided:

> This Act would ensure that periods of time during which an offender has an outstanding capias or bench warrant for failure to appear for a proceeding are not included in determining whether the statute of limitations has tolled prior to the initiation of a prosecution by Information or Indictment. **This addresses the practice of those who fail to appear in the justice of the peace courts until after the statute of limitations has tolled in a misdemeanor case. These offenders then transfer the case to the Court of Common Pleas where it is subject to dismissal because the Information commencing the prosecution in that Court has been filed outside the two or three year time limitation.** See Del. CODE Ann. Tit. 11, §§205(b)(2) (prosecution for class A misdemeanor "must be commenced within 3 years after it is committed"); 205(b)(3) (prosecution for all other misdemeanors "must be commenced within 2 years after it is committed"); and 205(g) ("prosecution is commenced when either an indictment is found or an information is filed."). [Emphasis added.]

CCP concluded that the newly adopted provision is directly on point. However, citing to Stogner v. California, 239 U.S. 607, 610 (2003), it held the *ex post facto* clause of the United States Constitution precludes its application to the case at hand. Thus, the Court considered the application of § 205 as it existed prior to the 2006 amendment. CCP's analysis follows:

> Upon a plain reading of the statute, the legislature has designated that for purposes of determining whether a criminal proceeding is barred by the statute of limitations, prosecution begins when an indictment is found or the State files an information. 11 *Del. C.* § 205(g). Neither an indictment was found nor an information filed in the case *sub judice*, until the Information was filed with the Court on June 15, 2006. ***
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> In support of its position, the State relies on *State v. Lynch* [footnote and citation omitted], in which the Superior Court interpreted the language of 10 *Del. C.* § 9902(a) to mean that the State has a right to appeal a final order of a lower court where the order constitutes a dismissal of an indictment, information or complaint. To reconcile the seemingly limiting language of § 9902(a) and the statute granting the Superior Court authority to hear appeals from the J.P. Court, the Court reasoned that for the purposes of interpreting § 9902, complaints and informations were essentially the same thing; "written accusations against a person charging him with a particular offense." Thus, the court permitted the

State's appeal, finding that the Legislature intended appeals from the J.P. Court to be included within the appellate jurisdiction of the court.

Although the Superior Court determined that a complaint and information should be treated identically for purposes of interpreting § 9902, the rationale in *State v. Lynch* applies to appellate jurisdiction and not to an analysis of the limitation of actions; this Court cannot ignore the plain language of § 205. The context of this case is different in that the plain language of § 205 does not conflict with any other authority granted to this Court. Unlike the Superior Court in *Lynch*, this Court is not faced with reconciling contrary statutory provisions, and *Lynch* is not applicable to the case at hand.

Furthermore, it is clear that complaints and informations are indeed different methods of commencing prosecution. Although each is a written statement of the essential facts constituting the offense charged, and must include the relevant statute, rule or regulation, a complaint need only be made by oath or affirmation by a complainant before a person authorized by law to preform a notarial act. An information, however, must be signed by the Attorney General. The Court concludes that the Legislature did not intend for the two types of charging documents to be treated identically for purposes of § 205 and that it intentionally excluded the less formal summons and complaint, or "ticket," from the statutory means of tolling the limitations period. If one of the exceptions set forth in § 205 do not apply, to preserve a criminal misdemeanor action commenced by complaint from the running of the statute of limitations, the State must file an Information within two years of the date the crime is committed.

Although the Court may not apply the current amendment to the case at hand..., it does note that the amendment shows that the Legislature identified and addressed an apparent "loophole" in the statute. *** The Court finds it compelling that after determining the statute was problematic, the Legislature did not alter the language of subsection (g) to include the filing of a complaint as the commencement of prosecution. Instead, it carved out a specific exception to deal with a very precise scenario. Accordingly, the Court concludes that the Legislature did not find the limiting language of subsection (g) to be problematic, nor did it intend for prosecution to commence upon the filing of a complaint. Therefore, I hold that prosecution "commenced" in this case (for the purposes of tolling the limitations period) when the State filed the Information in this Court on June 15, 2006.

Since the information was filed almost six years after the statute of limitations had expired, CCP held that the two-year statute of limitations barred the prosecution of defendant on these charges.

On appeal, the State argues as follows. CCP erred when it determined that an action

properly commenced in the JP Court is not, for statute of limitations purposes, properly commenced when transferred to CCP pursuant to 11 Del. C. § 5303. CCP, in concluding that the legislature intentionally excluded the summons and complaint from the tolling of the limitations period, rejected precedent established in Lynch that a criminal complaint is broadly understood to be included within the terms indictment and information. Furthermore, "the court's decision undercuts the constitutional role of the Justice of the Peace Court and undermines the standing policy of the Delaware Supreme Court discouraging manipulation of the judicial process." State's Opening Brief at 5-6.

The State's expanded argument is summarized as follows. The JP Court and CCP are constitutional courts. They have concurrent jurisdiction over criminal matters. 11 Del. C. § 2701(b).[15] An action is commenced in the JP Court by "complaint or information or, when lawful, by arrest or summons without a warrant or complaint." JP Crim. R. 3. A defendant may transfer a case commenced in JP Court to CCP pursuant to 11 Del. C. § 5303. In such a case, the matter proceeds as though originating in CCP by information filed. 11 Del. C. § 5305. Pursuant to CCP Rule 3, the action is properly commenced by the filing of an information or as otherwise provided by statute. Thus, the prosecution, by the transfer of the defendant, must be deemed to be

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[15]In 11 Del. C. § 2701(b), it is provided in pertinent part as follows:

> b) The Court of Common Pleas for the State shall have original jurisdiction to hear, try and finally determine all misdemeanors and violations alleged to have been committed within the State, except where jurisdiction over such offenses is vested exclusively in another court.
>
> ***
>
> The jurisdiction conferred by this subsection includes concurrent jurisdiction with the justices of the peace in all cases in which the justices of the peace have jurisdiction.

properly filed pursuant to statute and court rules.

The State then argues:

> It was, therefore, error for ... [CCP] to find that the instant prosecution was barred by the statute of limitations. Section 5303 of Title 11 of the Delaware Code specifically gives a defendant the right to remove an action commenced in Justice of the Peace Court to the Court of Common Pleas. Moreover, section 5303 does not limit its application to only those situations where a prosecution is commenced in the Justice of the Peace Court by information. Rather, section 5303 applies to all properly commenced actions. *See* 11 *Del. C.* § 5303 ("The accused in all criminal actions..."). Because Kelly's prosecution was properly commenced in the Justice of the Peace Court and removed, by statutory right of the defendant, to the Court of Common Pleas, it was properly commenced within the purview of Common Pleas Rule 3. [Emphasis in original.].

State's Opening Brief at 7.

The State went on to argue that CCP misinterpreted this Court's decision in Lynch, where it found that the terms "indictment or information" necessarily included "complaint" for purposes of appeal under 10 Del. C. § 9902(a). CCP held that it was not having to reconcile contrary statutory provisions as did the Court in Lynch. The State points out that CCP "failed to account for the interplay between 11 Del. C. § 5303, Common Pleas Court Criminal Rule 3, Justice of the Peace Court Criminal Rule 3 [footnote omitted] and longstanding public policy as established by the Delaware Supreme Court." Id. at 8-9. The State argues:

> The same considerations which lead [sic] this Court in *Lynch* to equate complaints with informations when delineating the State's right to continue a prosecution are present in the case *sub judice*. And, the language of the statutes and court rules applicable to this matter considered *in pari material* [sic] more clearly supports such an interpretation.

Id. at 9.

Finally, the State argues "sound public policy" dictates that the prosecution continue. It points out the numerous times when the Supreme Court has chastised the State for manipulating

the system and cites to State v. Fischer, 285 A.2d 417 (Del. 1971) and its progeny. The State argues that the suggested solution of the Court below on how to avoid the situation here - by nolle prossing in JP Court after a defendant fails to appear and filing an information in CCP - is a process at odds with these Supreme Court's rulings. To allow the defendant to manipulate the criminal system in order to circumvent the criminal justice system is contrary to existing law.

The State asks the Court to vacate and remand the matter.

Defendant argues as follows. The plain language of the statute, which provides that "a prosecution is commenced when either an indictment is found or an information is filed" requires the Court to affirm CCP's decision. Because the statute is clear, there is no room for interpretation and Lynch thus does not apply. 11 Del. C. § 5303 gives a defendant the right to transfer the case; it takes no notice of the issues here and does not create a conflict. The State, in relying upon the fact a case may be commenced in the JP Court by a criminal summons, ignores the plain language of the statute defining when a prosecution is commenced.

Defendant ineffectively addresses the manipulation argument as follows. He never accepted the jurisdiction of the JP Court since he never appeared there. He had the absolute right to transfer the case to CCP, and he must waive that right before the JP Court could try him. Shoemaker v. State, 375 A.2d 431 (Del. 1977).

As to the public policy argument, defendant argues that judicial legislating should not overrule the Legislature's clear intent, "in which the legislature determined that the formal nature of instituting a criminal case should begin with the Attorney General, and not with a police officer." Defendant's Answering Brief at 11.

DISCUSSION

The complaint, once filed with JP Court, commenced the criminal proceedings against defendant. The only question is whether commencement of those proceedings can be considered within the term "information" as defined in 11 Del. C. § 205(g) so that the prosecution is not time-barred.

But for the Legislature's action in enacting Senate Bill 334, this Court would conclude that Lynch was directly on point and follow it. In Lynch, the Superior Court's ruling was based on joint grounds. First, it ruled that the Legislature did not think about the scenario before it and if it had, it specifically would have equated complaints filed in the JP Court to informations and indictments and would have included them in the statute. It also ruled that complaints and informations are the same thing. However, the Legislature, in enacting Senate Bill 334, clarified that it did not consider a complaint in JP Court to be encompassed within the term "information". The synopsis to Senate Bill 334 clarifies that the amendment was enacted to address the very situation at hand. Such a clarification does not allow this Court to attribute an intent to the Legislature to include a complaint filed in JP Court within the term "information". Thus, it cannot follow the rationale of this Court in Lynch.

In light of the foregoing, this Court must affirm the decision of CCP dismissing the information on the ground that the statute of limitations had run.

IT IS SO ORDERED.